FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1992

VERL HADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, at petitioner's trial on charges that he sexually abused three children, the district court properly admitted testimony that petitioner sexually abused two other children as well.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutes and rules involved	2
Statement	2
A. The charges against petitioner	2
B. The admission of Cory K.'s extrinsic act testimony	5
C. The admission of Kyle Hartman's extrinsic act testimony	10
D. The court of appeals' affirmance of petitioner's conviction	13
Summary of argument	15
Argument:	
The trial court properly admitted testimony that petitioner had engaged in other acts of sexual abuse of children	17
A. The testimony was relevant	17
B. The testimony was not admitted for an improper purpose	24
C. The probative value of the testimony was not substantially outweighed by the danger of unfair prejudice	29
Conclusion	41
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Bourjaily v. *United States*, 483 U.S. 171 (1987) 18
Estelle v. *McGuire*, 112 S. Ct. 475 (1991) 18, 20, 33
Huddleston v. *United States*, 485 U.S. 681 (1988).. 8, 17, 18, 21, 24, 25, 26, 29, 33-34, 39
Maryland v. *Craig*, 110 S. Ct. 3157 (1990) 32
Mathews v. *United States*, 485 U.S. 58 (1988) 18

Cases—Continued: Page

Morris v. *Slappy*, 461 U.S. 1 (1983) 41
Nix v. *Williams*, 467 U.S. 431 (1984) 30
Richardson v. *Marsh*, 481 U.S. 200 (1987) 39
Spencer v. *Texas*, 385 U.S. 554 (1967) 39
State v. *Brooks*, 586 P.2d 1270 (Ariz. 1978) 5
State v. *Edward Charles L.*, 398 S.E.2d 123 (W. Va. 1990) 20
Taylor v. *Illinois*, 484 U.S. 400 (1988) 30
United States v. *Abel*, 469 U.S. 45 (1984) 24, 29
United States v. *Allen*, 798 F.2d 985 (7th Cir. 1986) 34
United States v. *Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1988) 35
United States v. *Grassi*, 602 F.2d 1192 (5th Cir. 1979), vacated, 448 U.S. 902 (1980)) 34
United States v. *Haney*, 914 F.2d 602 (4th Cir. 1990) 26
United States v. *Hudson*, 884 F.2d 1016 (7th Cir. 1989) 26
United States v. *Nixon*, 418 U.S. 683 (1974) 30
United States v. *Pedroza*, 750 F.2d 187 (2d Cir. 1984), cert. denied, 479 U.S. 842 (1986) 34-35
United States v. *Woods*, 613 F.2d 629 (6th Cir.), cert. denied, 446 U.S. 920 (1980) 26

Constitution, statutes and rules:

U.S. Const.:
Amend. VI 30
Art. III, § 2, Cl. 3 30
Indian Major Crimes Act, 18 U.S.C. 1153 2
Sexual Abuse Act of 1986, 18 U.S.C. 2241 *et seq.* 2
18 U.S.C. 2241 ..... 2, 36
18 U.S.C. 2241(a) 1a
18 U.S.C. 2241(a)(1) 2, 3, 5
18 U.S.C. 2242 ..... 1a-2a
18 U.S.C. 2244 ..... 2a
18 U.S.C. 2244(a)(1) 5, 2a
18 U.S.C. 2244(a)(2) 2, 4, 2a
18 U.S.C. 2245 ..... 2a-3a

Statutes and rules—Continued: Page

Ariz. Rev. Stat. Ann. § 13-1410 (1990) 5
Fed. R. Evid.:
Rule 102 17
Rule 401 ..... 2, 8, 15, 18, 19, 20, 3a
Advisory committee's note 18, 19, 34
Rule 402 ..... 2, 8, 17, 18, 3a
Rule 403 ..... 2, 7, 9, 16, 29, 37, 41, 4a
Advisory committee's note 29, 31, 34, 37, 38
Rule 404 ..... 4a
Advisory committee's notes 37
Rule 404(a) advisory committee's note 25
Rule 404(b) 2, 8, 16, 24, 25, 26, 27, 28, 29, 37, 4a
Advisory committee's note 25, 29, 32
Rule 608(b) 24
Rule 611(b) 23

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 24
Kuhns, *The Propensity to Misunderstand the Character of Specific Act Evidence*, 66 Iowa L. Rev. 777 (1981) 28
2 D. Louisell & C. Mueller, *Federal Evidence* (1985) 31
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J. Weinstein & M. Berger, *Weinstein's Evidence* (1991) 24
1A J. Wigmore, *Evidence* (1983) 25

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OPINION BELOW

The opinion of the court of appeals, J.A. 173-182, is reported at 918 F.2d 848.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990. A petition for rehearing was denied on September 9, 1991. The petition for a writ of certiorari was filed on December 9, 1991 (a Monday), and was granted on March 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Sexual Abuse Act of 1986, 18 U.S.C. 2241 *et seq.*, and Rules 401, 402, 403, and 404(b) of the Federal Rules of Evidence are set out in the Appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on two counts of aggravated sexual abuse of Amadee R., a 12-year-old Indian boy, in violation of 18 U.S.C. 2241(a)(1), and on one count of abusive sexual contact with Amadee R., in violation of 18 U.S.C. 2244(a)(2). Petitioner contends that the district court improperly applied the Federal Rules of Evidence in allowing testimony that petitioner committed acts of sexual abuse against other children.

A. The Charges Against Petitioner

In January 1988, the Federal Bureau of Investigation began a probe into allegations of widespread sexual abuse of children on the Navajo Indian Reservation. The FBI interviewed students at the Bureau of Indian Affairs' Chilchinbeto school near Kayenta, Arizona. Tr. 1449-1453. Those interviews implicated petitioner, a 40-year-old Indian who taught at the Chilchinbeto school. A federal grand jury subsequently returned an indictment charging petitioner under the Indian Major Crimes Act, 18 U.S.C. 1153, with 11 counts of sexual abuse involving five Indian boys: Travis Y. (Counts 1-2); Cory K. (Counts 3-6); Amadee R. (Counts 7-9); Jonathan T. (Count 10); and Fernando Y. (Count 11). See J.A. 3-7.

Prior to trial, petitioner moved to sever the counts of the indictment. He argued that a severance should

be granted because he intended to defend against Counts 3 through 6, which charged that he sodomized Cory K., on the ground that the boy consented to the acts. See Supp. Memo. in Support of Motion to Sever Counts of the Superseding Indictment (filed April 21, 1989) (CR 89).[1] The district court elected to sever Counts 1 through 6, which all involved charges of involuntary sodomy under state law and gave rise to the possible defense of consent, from Counts 7 through 11, which all involved what the court called "a touching situation, or a contact situation." J.A. 9, 10, 13. See April 27, 1989, Order (CR 100).

The government went to trial on the latter group of charges. Count 7 charged that petitioner committed aggravated sexual abuse against Amadee R. in violation of 18 U.S.C. 2241(a)(1), which required the government to prove that petitioner sodomized or attempted to sodomize Amadee R. through the use of force. The charge was based on petitioner's actions in taking Amadee home from an indoor swimming pool at the Kayenta High School in October 1987, when the boy was 12 years old. Petitioner allowed Amadee, the sole passenger in petitioner's car, to steer the car while sitting on petitioner's

[1] In his brief in this Court, petitioner spends several pages setting forth the impeachment of Cory K., apparently for the purpose of suggesting that Cory K.'s testimony about having sexual relations with petitioner was fabricated. See Pet. Br. 12-14. That suggestion is inconsistent with his pretrial position in the district court, where he stated that he would defend against the charges of sodomizing Cory K. by arguing that Cory K. consented to the acts of sodomy between them, and where he offered to submit an affidavit to that effect. Pretrial Tr. 91-94 (April 25, 1989); *id.* at 108 (petitioner "would testify that none of the other sexual acts occurred, but with Cory [K.] that there was consensual sexual activity").

lap. While the boy was positioned behind the steering wheel, petitioner told Amadee to pull down his pants. When Amadee did so, petitioner placed his penis in Amadee's anus. Amadee then pulled himself away and insisted that petitioner take him home. See Tr. 537-544.

Count 8 also charged petitioner with aggravated sexual abuse against Amadee R. That charge was based on a similar incident in November 1987, when petitioner again gave Amadee a ride home from the Kayenta High School swimming pool. As on the previous occasion, petitioner allowed Amadee, the sole passenger in petitioner's car, to steer the car while sitting on petitioner's lap. Petitioner tried to get Amadee to remove his pants. When Amadee felt petitioner's penis become erect, he moved to the passenger side of the car and asked to be taken home. See Tr. 544-546.

Count 9 charged that petitioner committed abusive sexual contact against Amadee R. in violation of 18 U.S.C. 2244(a)(2), which required the government to prove that petitioner touched the genitalia of the boy with the intent to arouse or gratify a sexual desire. That charge was based on an incident in February 1988. Petitioner offered to drive Amadee home from the Kayenta High School swimming pool. En route, they stopped at petitioner's trailer home. Petitioner put a videotaped movie on the television set, told Amadee to undress, and rubbed green lotion on the boy's cheek, back, and legs. Petitioner then directed Amadee to pull down his shorts, and petitioner started rubbing lotion on the boy's penis. Tr. 550-554. At that point, Amadee "hurried up and pulled up [his] shorts," got dressed, and told petitioner to take him home. *Ibid.*

Count 10 charged that petitioner molested Jonathan T. in violation of state law, which required the government to prove that petitioner directly touched the private parts of a child less than 15 years old and was motivated by an unnatural or abnormal sexual interest. See Ariz. Rev. Stat. Ann. § 13-1410 (1990): *State* v. *Brooks*, 586 P.2d 1270 (Ariz. 1978). The charge was based on an incident at the Chilchinbeto school where petitioner taught. Jonathan testified that in October 1986, petitioner gave him a pair of pants to replace his torn trousers. Petitioner accompanied Jonathan, who was then 6 years old, to a storage room, where Jonathan changed his clothes. According to Jonathan, petitioner touched Jonathan's penis while he changed. See Tr. 433-438.

Count 11 charged that petitioner committed abusive sexual contact against Fernando Y., in violation of 18 U.S.C. 2244(a)(1), which required the government to show that petitioner touched the genitalia of a child less than 12 years old with the intent to arouse or gratify a sexual desire. That charge also was based on an incident at the Chilchinbeto school. Fernando testified that in May 1988, when he was 10 years old, petitioner approached him from behind while he was urinating in the school restroom. Petitioner pressed his groin against Fernando and touched the boy's chest and penis. See Tr. 389-393.

B. The Admission of Cory K.'s Extrinsic Act Testimony

Prior to trial, when the district court conferred with counsel about severing the counts of the indictment, the question arose whether the government could use the testimony of Travis Y. and Cory K.—the boys identified in severed Counts 1 through 6 as victims of petitioner's nonconsensual sodomy—at the trial on Counts 7 through 11. The trial judge indicated that the testimony would be admissible "as to the intention, motive, plan, whatever, of making these touch-

ings and contacts, and what the context of them were." J.A. 9. He explained that "[t]he touching was leading up to sodomy, i.e., it is relevant, I think, for what the sexual context of it and what [petitioner] would have been touching them about." J.A. 12. The judge stated that "that would be my tentative ruling, subject to whatever occurred during the trial that might suggest to the contrary." J.A. 13.

The jury first heard testimony from each of the alleged victims: 11-year-old Fernando Y. (Tr. 385-427); 9-year-old Jonathan T. (Tr. 428-492); and 13-year-old Amadee R. (Tr. 537-607). The trial judge then revisited the issue of admitting the testimony of Travis Y. and Cory K. concerning petitioner's prior acts of child sodomy (Tr. 656-676). See J.A. 14-25. The government argued that their testimony was relevant and admissible to establish that petitioner's actions with respect to the minor children were sexually motivated and not innocent conduct. J.A. 14-15. The court expressed tentative agreement, indicating that the testimony was relevant to explain petitioner's associations with the victims in the counts being tried—"why [petitioner is] touching these boys and doing these things." J.A. 15.[2]

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[2] The court rejected defense counsel's suggestions that intent and motive were not at issue, stating (J.A. 25):

> You have presented evidence now that would lead the jury to believe that [petitioner], for instance, is dealing with these younger people, taking them home, doing these things, * * * that he was just helping them out, getting them a pair of pants, taking them home, stopping by his house, picking them up, moving them around, that is all —that is intent and motive evidence why he was dealing with them. Isn't it?

See also J.A. 16 ("His acts with these other people, arguably, would tell the jury what his intention was, what his motive

The next day, the judge reaffirmed his ruling that the challenged evidence was admissible; he reiterated his conclusion that petitioner's intent and motive were at issue in the case and that the testimony of Travis Y. and Cory K. "would be relevant in the jury's consideration." J.A. 26-27.[3] The judge then noted that the admission of the testimony was subject to Rule 403, Fed. R. Evid., which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of "unfair prejudice." J.A. 27. He indicated that he would "screen or sanitize" the testimony "as much as possible" so that the "gross nature of the other acts simply wouldn't be so prejudicial as to inflame the jury." J.A. 28. Petitioner's counsel inquired whether petitioner could enter into a stipulation to avoid the introduction of the testimony. J.A. 30.[4] The judge stated that he would not require the government to enter into such a stipulation, and the

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was, why he was doing these things with these three victims, alleg[ed] victims, that we are discussing.").

[3] The judge noted that the offenses required a showing of intent (J.A. 26) and that defense counsel himself had raised questions of intent through cross-examination "having to do with [petitioner's] interest in children, his willingness to help, in a sense his neighborliness or school teaching character, the suggestion that the lotion involving Amadee R[.] was simply a post swimming skin tone, things like that [which] are all there before the jury and have been put in for that purpose." J.A. 28.

[4] Counsel asked, "What if we stipulated that if the private parts of [Amadee R., Jonathan T., and Fernando Y.] were in fact touched, that it was with a sexual intent? And then simply have the issue about whether or not it occurred go to the jury. And that way we would officially eliminate the issue." J.A. 30.

prosecutor indicated that he was not interested in doing so. *Ibid.* See also Tr. 856-857.[5]

Several days later, petitioner's counsel renewed his offer to stipulate to intent. See Tr. 864-865, 877-878. The trial judge observed that counsel was not offering to stipulate to what was central in Cory K.'s testimony—that petitioner had previously had sex with children. Tr. 878. Rather, petitioner's counsel offered to stipulate only that to the extent that "any of the acts that are alleged in the indictment * * * occurred, that they occurred, because of the intent required by the statute and for purposes of sexual gratification." J.A. 33. The judge ruled that Cory K.'s testimony was admissible and that the government was not required to accept the proposed stipulation as a substitute. J.A. 35.[6]

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[5] The judge also noted that he would need to make a preliminary determination that there was "clear and convincing" evidence that the "other acts" occurred. See J.A. 27-28, 28-29; see also Tr. 691-700. Later that day, the judge heard the testimony of Cory K. and Travis Y. outside the presence of the jury for that purpose. See Tr. 691-700, 772-857. Cory K. testified that petitioner had sexually abused him, Tr. 773-781, but Travis Y. denied having sexual relations with petitioner, Tr. 817-822, and the government did not pursue further the use of Travis Y.'s testimony, Tr. 869-870. After he conducted the hearing, the judge discovered that a "clear and convincing" showing is unnecessary. Tr. 862-863. See *Huddleston* v. *United States*, 485 U.S. 681 (1988).

[6] The judge first concluded, in accordance with Rules 401, 402, and 404(b), Fed. R. Evid., that the evidence was relevant and admissible for a proper purpose:

> [T]he evidence with respect to prior bad acts involving, in this instance, [Cory K.] are relevant, the evidence goes to the motive and intent of [petitioner], as well as whether there were any particular plans or preparations having to do with his conduct in these kind of activities and whether that, in this instance or these instances before the jury, were similar to those on other occasions.

J.A. 35. The judge then ruled, in accordance with Rule 403, Fed. R. Evid., that the probative value of the evidence was not outweighed by the danger of unfair prejudice:

> The evidence having to do with prior bad acts, how they were allegedly undertaken and carried out, the probative value of that evidence outweighs any unfair prejudice to the defendant. There is a similarity of the acts. The considerations reflected in *Huddleston* [v. *United States*, 485 U.S. 681 (1988)], that evidence could also be considered as corroborative of the testimony of other witnesses.

J.A. 35. The court observed that the stipulations proposed by petitioner's counsel would not serve as an adequate substitute for the testimony. *Ibid.*

The government then called Cory K. to the witness stand and the judge gave the jury a cautionary instruction on the use of his testimony. J.A. 74-75. Cory, who was then 19 years old, testified that when he was 12 he had sexual relations with petitioner. *Ibid.* He stated that petitioner had anally sodomized him between ten and 20 times at petitioner's trailer home. J.A. 76. Cory recounted a specific incident that occurred on September 5, 1985. Petitioner drove Cory from a local market to petitioner's home, put a videotaped movie on television, applied Aloe lotion to both of them, and then had anal intercourse with the boy in various positions, including while the boy was seated on petitioner's lap. J.A. 78-80. Cory also testified that in other instances, petitioner usually picked him up in petitioner's car, they were always alone, and petitioner always used lotion. J.A. 84-85.

C. The Admission of Kyle Hartman's Extrinsic Act Testimony

Petitioner's principal defense was that the FBI had manipulated and coerced the child victims into falsely accusing petitioner. See Pet. Br. 20; J.A. 15. Petitioner's counsel contended in his opening statement that the FBI was under intense pressure to solve a case that had generated widespread publicity and that FBI agents had induced the children through suggestive and manipulative interview techniques to implicate petitioner falsely. See Tr. 344-351. Petitioner argued that FBI agents did not find victims, but "created them" to satisfy their superiors. *Ibid.* Later, during cross-examination of the child victims, petitioner repeatedly sought to suggest that FBI agents had coerced the children into implicating him. See Tr. 404-405, 451, 574-576.

Petitioner testified in his own defense. Tr. 1262-1393. He first addressed the charges that he had fondled Fernando Y. and Jonathan T. at the Chilchinbeto school. Petitioner testified that he was absent from the school virtually the entire month of May 1988, and he denied that he had any contact with Fernando Y. in the school restroom. Tr. 1268-1269. Petitioner recalled the day that Jonathan T. had torn his trousers. He testified that he and Jonathan went to a storage room to find a pair of sweat pants that Jonathan could wear. Tr. 1271-1274. Petitioner testified, however, that Jonathan changed his pants out of petitioner's presence and that petitioner did not touch Jonathan. Tr. 1274, 1275-1278.

Petitioner also testified concerning the charges that he had sexual contact with Amadee R. Petitioner stated that he had organized after-school field trips to the Kayenta High School swimming pool to motivate classroom performance. Tr. 1280, 1282.

He explained that Amadee R. was one of his students who had participated in the swimming trips and was also one of his Indian clan members. Tr. 1281-1283. Petitioner stated that he drove Amadee home from the swimming outings and generally treated him as a nephew, explaining that teachers sometimes "take certain students and we extend our personal selves beyond the teacher-student relationship." Tr. 1285. Petitioner testified that on one occasion when returning from a swimming outing, he had allowed Amadee to sit on his lap and steer the car, but petitioner claimed there was no sexual contact between them. Tr. 1287-1289. Petitioner acknowledged giving Amadee a ride home on February 1, 1988, but he denied taking Amadee to his trailer on that date. Tr. 1291-1292.

Petitioner acknowledged that he did "know of" Cory K., that he had allowed the boy to sleep over at his house one night, and that the boy "may have" been at his residence on other occasions. Tr. 1294-1295. But petitioner disputed Cory K.'s testimony and denied that they had ever had sexual relations. Tr. 1295, 1326. Petitioner testified that he had a drinking problem at the time, but that during the period from 1984 to 1985 he did not "ever have sexual relationships with other minors." Tr. 1326.

On cross-examination, petitioner admitted that he had a reputation for tickling male students "in a playful manner, or if I am instructing in a classroom," and he expressed the view that such contact is appropriate "outside on the playground." J.A. 41-42. After initially denying that he let minors other than Amadee R. drive his car, petitioner admitted that he had received a traffic citation in 1976 for allowing a 13-year-old boy, who was "[m]ost likely" a student at the school where petitioner taught, to drive peti-

tioner's car while sitting on petitioner's lap. J.A. 42-43, 44-45; Tr. 1353, 1356-1357. When asked, "[I]s it your testimony here today that you have never had sexual intercourse with any minor males?" petitioner replied, "That's correct." J.A. 125.

On rebuttal, an FBI agent testified that petitioner had admitted in an interview that there was a "definite possibility" that he had sodomized Cory K., but that he was not sure because he was drinking heavily during that period. Tr. 1460-1462. In addition, the prosecutor informed the court that FBI agents in Colorado had recently interviewed an adult male named Kyle Hartman. Hartman had told the agents that petitioner had sodomized him when Hartman was a fifth-grade student. J.A. 48. The prosecutor subsequently sought to use Hartman's testimony to challenge petitioner's defense that the charges against petitioner were the product of FBI coercion and to rebut petitioner's testimony that petitioner had a strictly benevolent relationship with the child victims and had never had intercourse with any minor males. J.A. 58-60. Over the objection of petitioner's counsel, the trial judge agreed to allow the testimony. J.A. 69-71.[7]

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[7] The judge heard Kyle Hartman's testimony outside the presence of the jury before making his ruling. See Tr. 1608-1625. The judge explained that he would admit Hartman's testimony "because [petitioner] took the stand and testified and, in carefully phrased questions on direct, with respect to time frames and other matters, denied that he had ever had sexual relations i.e. any intention in effect to do those kind of things, any plan, any practice of doing those things, denied having minors in his home, denied any kind of activities similar to this." J.A. 69-70. The judge also noted that the government was severely limited by the nature of the evidence in this case: it involved young Indian victims who were unsophisticated and reluctant to testify, and the "opportunities to confuse witnesses, to confuse issues, [was] simply overwhelming." J.A. 70. Finally, the court noted that Hartman's testimony also involved petitioner "in his position as a teacher or a teacher's aid dealing with young students who are there." *Ibid.*

Kyle Hartman, who was 27 years old, testified that when he was a fourth grade student he had met petitioner, who was a teacher's aide at an elementary school in Kayenta. J.A. 125-126. The judge gave the jury a limiting instruction similar to the one preceding Cory K.'s testimony. J.A. 127. Hartman then testified that, beginning in 1971 or 1972, when Hartman was about ten years old, petitioner had sexually abused him. J.A. 128. The first episode occurred when petitioner invited Hartman to petitioner's trailer home and directed the boy to put on petitioner's swimming trunks. Petitioner tickled and wrestled with Hartman and then grabbed the boy's penis. J.A. 128-129. About one year later, petitioner anally sodomized Hartman at petitioner's trailer. J.A. 129. On two subsequent occasions, about one year apart, petitioner visited Hartman at Hartman's home and anally sodomized the boy. J.A. 129-130.

D. The Court of Appeals' Affirmance of Petitioner's Conviction

The jury found petitioner guilty on Counts 7, 8, and 9, charging him with aggravated sexual abuse of and abusive sexual contact with Amadee R., but it acquitted him on Count 10, charging him with molesting Jonathan T., and on Count 11, charging him with abusive sexual contact with Fernando Y. The court of appeals affirmed the convictions, rejecting petitioner's objections to the admission of the

testimony of Cory K. and Kyle Hartman. J.A. 173-182.

The court of appeals stated that extrinsic act evidence is admissible if there is sufficient proof that the defendant committed the acts, if the acts are not too remote in time, and if the acts are admitted to prove a material fact. J.A. 175. Furthermore, when intent is at issue, the other acts must be similar to the charged offense. *Ibid.* The court held that the testimony of Cory K. and Kyle Hartman was sufficiently detailed to allow the jury to conclude that petitioner committed the acts of sexual abuse. J.A. 176. It also held that in light of the similarity between the charged offenses and the acts to which Hartman testified, the acts that Hartman related were not unduly remote in time. *Ibid.* The court concluded that the other acts were properly offered to prove a material fact, because the abusive sexual contact offense required proof of specific intent, and the other acts evidence was sufficiently similar to the charged offenses to warrant admission on an intent theory. J.A. 176-177.

The court rejected petitioner's argument that because petitioner's defense was nonparticipation in the charged offenses, intent was not an issue in the case. The court explained that petitioner's choice of defenses did not relieve the government from having to prove intent and did not bar the government from proving intent by evidence of other acts. J.A. 177-178. Finally, the court held that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice. The court emphasized that the evidence was highly probative of petitioner's intent and that any potential for unfair prejudice was cured by the court's jury instructions. J.A. 178-179.

SUMMARY OF ARGUMENT

The Federal Rules of Evidence allow admission of extrinsic act evidence at trial if the evidence is relevant, if it is not introduced for an improper purpose, and if its probative value is not substantially outweighed by the danger of unfair prejudice. When the government prosecutes a criminal offense, it may introduce evidence that the defendant previously committed a similar offense if the government satisfies those three criteria. The government properly introduced such evidence in this case.

A. The testimony of Cory K. and Kyle Hartman was relevant because it assisted the jury in determining facts of consequence at trial. See Fed. R. Evid. 401. Petitioner was indicted on charges that he sexually abused adolescent boys, and the government was obligated to prove those charges beyond a reasonable doubt. Petitioner's physical acts and his mental state were facts of central consequence. Cory K. and Kyle Hartman testified that petitioner had sexually abused them when they were adolescent boys. That testimony supported the government's theory that petitioner was someone who engaged in the unusual conduct involved here, that petitioner's specific, arguably innocent acts (such as placing a boy on his lap or applying lotion to the boy's body) were a prelude to sexual activity, and that petitioner associated with the child victims because he viewed them as a source of sexual pleasure. The testimony from Cory K. and Kyle Hartman also served to rebut petitioner's defense that FBI agents had coerced and manipulated the child victims to testify against petitioner.

B. The testimony of Cory K. and Kyle Hartman was not admitted for an improper purpose. Extrinsic act evidence may not be introduced if it is to be used

"to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404 (b). The Rule does not prohibit the government from using extrinsic act evidence for any other purpose, such as to demonstrate that a person has engaged in a distinctive pattern of behavior and to draw non-character-based inferences from that pattern of past behavior concerning the person's acts and mental state on the specific occasion in question. The testimony from Cory K. and Kyle Hartman did not violate Rule 404(b), because that evidence was not admitted to enable the jury to draw character-based inferences from the extrinsic acts.

C. The probative value of Cory K.'s and Kyle Hartman's testimony was not substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. As the district court and the court of appeals recognized, the testimony was highly probative because the witnesses related specific instances of sexual abuse that were very similar to the charges at trial. The testimony of those two adults was especially probative in light of the difficulties the government faced in proving that sexual offenses had been committed against the inarticulate child victims in this case. Petitioner's offer to stipulate that if he sexually abused the children he did so for sexual pleasure was an inadequate substitute for the testimony; the government was therefore entitled to insist on presenting the evidence rather than settling for the proposed stipulation. Finally, the trial court effectively eliminated any danger of unfair prejudice through limitations on the scope of the testimony and through jury instructions that, if anything, were overly restrictive in the limitations they placed on the jury's use of the testimony.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY THAT PETITIONER HAD ENGAGED IN OTHER ACTS OF SEXUAL ABUSE OF CHILDREN

The Federal Rules of Evidence were designed "to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. A central theme of the Rules is that the factfinder ascertains the truth through the evaluation of relevant evidence. As this Court has explained:

> Rules 401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter rules do not flatly prohibit the introduction of such evidence, but instead limit the purpose for which it may be introduced.

Huddleston v. *United States*, 485 U.S. 681, 687 (1988). The trial judge properly admitted the testimony of Cory K. and Kyle Hartman pursuant to those Rules. The testimony was relevant, it was not admitted for an improper purpose, and its probative value outweighed any danger of unfair prejudice.

A. The Testimony Was Relevant

Rule 402 of the Federal Rules of Evidence states a fundamental principle to guide the admission of evidence at trial: "All relevant evidence is admissible, except as provided by the Constitution of the United

States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence may be relevant even if its probative value is limited. As this Court has repeatedly stated, "Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Huddleston*, 485 U.S. at 691; *Bourjaily* v. *United States*, 483 U.S. 171, 179-180 (1987).

As this Court has explained, relevance "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Huddleston*, 485 U.S. at 689 (internal quotation marks omitted). "Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand." Fed. R. Evid. 401 advisory committee's note. Thus, in applying Rules 401 and 402, a court must first identify what facts are of consequence at trial and then determine whether the offered evidence tends to make those facts more or less probable.

1. In a criminal prosecution, the government's charge that the defendant committed the alleged offense identifies the matters the government must prove at trial. A defendant's plea of not guilty "puts the prosecution to its proof as to all elements of the crime charged." *Estelle* v. *McGuire*, 112 S. Ct. 475, 481 (1991); *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988).

Petitioner pleaded not guilty to all the counts of the indictment. The government was therefore obligated to prove all the elements of the offenses charged in Counts 7 through 11. Counts 7 and 8 required the government to prove beyond a reasonable doubt that petitioner engaged in or attempted to engage in a sexual act with the identified child, while Counts 9, 10, and 11 required the government to prove beyond a reasonable doubt that petitioner physically touched the identified child with a sexual motivation or intent. As the charges made clear, petitioner's physical acts and his state of mind in committing those acts were facts of central consequence at trial.[8]

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[8] Petitioner's contention that intent "was not a contested issue" (Pet. Br. 29) is inaccurate. The trial judge noted repeatedly that the issue of intent was important to determining whether petitioner unlawfully touched the boys and attempted to do so, or whether his dealings with them were entirely benevolent, as petitioner asserted. See J.A. 15, 16, 25, 26, 28, 46; see also J.A. 176-178. In any event, a fact need not be contested to be a "fact that is of consequence to the determination of the action." Fed. R. Evid. 401. As the Rules Advisory Committee explained:

> The fact to which evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.

Fed. R. Evid. 401 advisory committee's note. The trial judge correctly recognized (J.A. 9, 15, 22, 23, 46) that the government was entitled to demonstrate petitioner's state of mind—including the intentions that motivated his action—as evidence that he attempted to sodomize Amadee R. (Counts 7 and 8) and had sexual contact wtih Amadee R., Jonathan T.,

2. As is commonly true in cases involving sexual abuse of children, the government had no witnesses to the charged offenses other than the child victims themselves. In making its evidentiary presentation, the government relied on the children's description of petitioner's acts to establish petitioner's physical contacts and to allow inferences concerning petitioner's state of mind. In addition, the government introduced evidence—the testimony of Cory K.—that petitioner had previously engaged in similar sexual acts with a boy of similar age with whom petitioner associated in similar circumstances. Cory K.'s testimony was relevant because it had a tendency to make the existence of facts of consequence to the determination of the action more probable than it would be without the evidence. Fed. R. Evid. 401.

Cory K.'s testimony was relevant to the question whether petitioner had physical contact with Amadee R., because it related conduct by petitioner that was very similar to conduct reported by Amadee R. in his testimony. Without Cory K.'s testimony, the jury might have doubted the testimony of Amadee R. in part on the ground that the conduct he reported was so aberrant that the jury would be tempted to believe that Amadee R. made it up.[9] Cory K.'s testimony,

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and Fernando Y. (Counts 9, 10, and 11). See *Estelle* v. *McGuire*, 112 S. Ct. at 481 ("the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense").

[9] See *State* v. *Edward Charles L.*, 398 S.E.2d 123, 132-133 (W. Va. 1990):

> [T]hese cases generally pit the child's credibility against an adult's credibility and often times an adult family member's credibility. Since sexual abuse committed against children is such an aberrant behavior, most people find it easier to dismiss the child's testimony as being coached or made up or conclude that any touching of a child's private parts by an adult must have been by accident.

however, established that petitioner engaged in strikingly similar conduct with him, involving anal intercourse, the use of Aloe lotion, and the showing of videotaped movies at petitioner's trailer. A jury that might have supposed one such report of such conduct to be fabricated would be much less likely to assume that two witnesses independently made up such a story. The trial judge therefore properly relied on the distinctive nature of the similar acts in finding them relevant. See J.A. 26-27, 30, 35.

Cory K.'s testimony was also relevant to the issue of petitioner's state of mind with respect to his conduct toward the boys. As this Court has explained, extrinsic act evidence is especially pertinent when the issue "involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston*, 485 U.S. at 685. In this case, the government was required to prove that the touchings were not innocent or incidental, but that petitioner touched the children for sexual gratification. Cory K.'s testimony established that petitioner obtained sexual gratification from having sexual relations with young boys. The testimony therefore made it more probable that petitioner's acts, such as placing Amadee R. on his lap or applying lotion to Amadee's body, were not innocent or incidental, but were a prelude to sodomy. In admitting the testimony, the trial judge properly relied on that theory of relevance as well. See J.A. 12, 27, 28, 30, 35.

Finally, Cory K.'s testimony was relevant because it assisted the jury in understanding the motivations

that prompted petitioner's more general association with the children in this case. The government's theory at trial was that petitioner associated with children because they provided him with a potential source of sexual pleasure, and not because he took a benevolent interest in their welfare. Cory K.'s testimony supported the inference that petitioner's activities with the children—such as giving Amadee R. rides and providing Jonahan T. with a pair of pants —were not motivated merely by generosity and goodwill, as petitioner claimed. In admitting Cory K.'s testimony, the trial judge properly relied on that rationale. See J.A. 9, 12, 15-16, 22, 23, 25, 28, 35.

3. The government called Kyle Hartman as a rebuttal witness. Hartman testified that during a five-year period beginning when Hartman was ten years old, petitioner anally sodomized him on several occasions. Hartman's testimony was relevant to rebut petitioner's defense, raised in his counsel's opening statement, that the government had fabricated the testimony against him, and to rebut petitioner's explanation of his acts and mental state. See J.A. 58, 59-60.

Petitioner's counsel contended in his opening statement that the FBI had pressured the victims in this case to fabricate accusations of sexual abuse in response to a recent "frenzy about finding, identifying, prosecuting, and punishing teachers on the Navajo Indian Reservation that are molesting children." Tr. 345. The government was entitled to answer that assertion. The 27-year-old Hartman's testimony concerning sexual abuse was relevant, because it corroborated the testimony of the victims in this case and effectively repudiated petitioner's contentions that the government "created" victims (Tr. 346) by coercing and manipulating young children. Hartman's testimony was additionally relevant because he lived outside the Kayenta community, and he described instances of petitioner's sexual abuse that occurred long before the FBI supposedly came under "severe pressure" (*Ibid.*) to solve the child abuse problem there.

Hartman's testimony was also relevant to rebut petitioner's testimony concerning his relationships with children, including his relationships with the child victims in this case. Petitioner testified on direct examination that he had only benevolent, nonsexual relations with the child victims, Tr. 1271-1278, 1281-1292, that he did not have a sexual relationship with Cory K., Tr. 1294-1295, 1326, and that during the period in 1984 through 1985, when petitioner had a "drinking problem," he did not "ever have sexual relationships with other minors," Tr. 1326.[10] The government was entitled to rebut petitioner's testimony on those subjects. In addition, Hartman's testimony was relevant for the same reasons that Cory K.'s testimony was relevant—it indicated that petitioner had engaged in the distinctive conduct al-

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[10] Petitioner's counsel objected when the prosecutor asked on cross-examination, "And do I understand your testimony to be that you have never engaged in any sexual acts with minors?" J.A. 123. The judge correctly ruled, however, that the question was within the scope of petitioner's direct testimony. J.A. 123-125; see Fed. R. Evid. 611(b). As the judge noted later in the proceedings, petitioner's testimony on direct examination was designed to give the impression that he was denying that he had ever had sexual relations with minors, although the denial was actually more limited. See J.A. 69-70 (finding that petitioner testified "in carefully phrased questions on direct, with respect to time frames and other matters, denied that he had ever had sexual relations, * * * denied having minors in his home, denied any kind of activities similar to this").

leged, it showed petitioner's state of mind in touching children, and it explained why petitioner associated with children. See J.A. 57, 58, 69-70.[11]

B. The Testimony Was Not Admitted For An Improper Purpose

1. Evidence is excludible if it is offered for an improper purpose. Rule 404(b) prohibits the admission of evidence offered for one such purpose: "to prove the character of a person in order to show action in conformity therewith." The Rule, however, does not limit the introduction of extrinsic act evidence for any other purpose. Indeed, Rule 404(b) was crafted to ensure "that restrictions would not be placed on the admission of such evidence." *Huddleston*, 485 U.S. at 688-689. As one leading treatise puts it, "Only one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely than men generally to have committed the act in question." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[08], at 404-52 (1991).

Significantly, Rule 404(b)'s prohibition on the use of extrinsic act evidence is limited to proof of "character," a term that describes the "moral qualities which belong to and distinguish an individual person." *Black's Law Dictionary* 211 (5th ed. 1979);

[11] Petitioner argued at trial that the court should have excluded Hartman's testimony because Rule 608(b), Fed. R. Evid., prohibits the impeachment of a witness's credibility by extrinsic evidence. Hartman's testimony, however, did not merely impeach petitioner's veracity, but was directly relevant to facts of consequence at trial. Rule 608(b) does not prohibit the admission of extrinsic evidence in that circumstance. See *United States* v. *Abel*, 469 U.S. 45, 55-56 (1984).

see also 1A J. Wigmore, *Evidence* § 52, at 1148 (1983) (defining character, for relevancy analysis, as "the actual moral or psychical disposition or sum of traits"); 1 J. Strong, *McCormick on Evidence* § 195, at 825 (4th ed. 1992) ("Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness.").

Rule 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." *Huddleston*, 485 U.S. at 687. Thus, if extrinsic act evidence is offered to prove a person's moral qualities in order to draw inferences about how he behaved on a particular occasion, the evidence is inadmissible.[12] If the evidence is offered for a purpose that does not depend on an inference from his character, however, Rule 404(b) does not bar the admission of the evidence. See *Huddleston*, 485 U.S. at 688 ("If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.").

[12] The Advisory Committee's notes on Rule 404 recite several reasons for the limitation on the use of "character evidence":

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Fed. R. Evid. 404(a) advisory committee's note (citation omitted). Rule 404(b) is a "specialized but important application of the general rule excluding circumstantial use of character evidence." Fed. R. Evid. 404(b) advisory committee's note.

Because it bars only inferences from character, Rule 404(b) does not prevent the government from offering proof of extrinsic acts to show that a person has engaged in a pattern of distinctive behavior that includes the conduct with which he is charged. That pattern of conduct may reflect the person's modus operandi, be part of a plan of criminal activity, or otherwise distinctively associate him with particular criminal activity. 1 J. Strong, *McCormick on Evidence*, *supra*, § 190. As long as the chain of inferences from the evidence in question to the fact to be proved does not require the factfinder to make a judgment about the person's general character traits, such as his dishonesty, his violent nature, or his disregard for the law, Rule 404(b) does not bar the use of the evidence. See *Huddleston*, 485 U.S. at 687.

For example, if a person who had sexually abused children were charged with robbing a bank and taking hostages, Rule 404(b) would prohibit the government from introducing evidence of his past instances of child abuse to prove that the person had a criminal disposition and therefore was more likely to have committed the robbery. See J.A. 27. But Rule 404(b) would not prohibit the government from introducing evidence that the person had previously committed a series of bank robberies in which he had taken hostages, and drawing an inference—without reference to the person's character—that a person who had engaged in that unusual and distinctive pattern of conduct in the past did so on the particular occasion in question. See, *e.g.*, *United States* v. *Haney*, 914 F.2d 602, 607 (4th Cir. 1990); *United States* v. *Hudson*, 884 F.2d 1016, 1021-1022 (7th Cir. 1989); *United States* v. *Woods*, 613 F.2d 629, 635 (6th Cir.), cert. denied, 446 U.S. 920 (1980).

Two additional examples may further illustrate the point. Suppose that in a prosecution for bank robbery the government proved that the robber whistled a particular tune during the robbery. The government clearly would be permitted to introduce evidence that in the course of two prior bank robberies, the defendant had been heard whistling the same tune. The evidence would be relevant not because of any character-based inference, but because the pattern of conduct was so similar that it makes it substantially more likely that the defendant was the person who committed the charged robbery.

The result would be the same if the robber gratuitously shot one of the tellers before leaving the bank, and the prosecution could show that the defendant had shot a teller before leaving the bank during two earlier bank robberies. The extrinsic act evidence in the second example obviously carries a much greater weight of moral opprobrium than the extrinsic act evidence in the first example, but the evidence is no less relevant. The evidence in the second example, like the evidence in the first, is not excludible under Rule 404(b), since it is not being offered to prove a character-based trait in order to show that the defendant committed the robbery. That is, the jury is not being asked to conclude that the defendant probably committed the charged bank robbery because he is an evil person; instead, the evidence is logically relevant because the similarities in the robberies makes it more likely that the person who committed the two prior robberies committed the charged robbery as well.[13]

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[13] It is possible, of course, to define "character" so expansively as to include cases such as those in the hypothetical examples: the practice of taking hostages during bank rob-

2. Rule 404(b) does not bar the admission of extrinsic act evidence of the sort introduced in this case. The testimony of Cory K. and Kyle Hartman was relevant for purposes other than to demonstrate petitioner's character and to ask the jury to draw character-based inferences. The prior instances of child sexual abuse were relevant to prove that petitioner engaged in the charged acts and that he did so for sexual purposes, without regard to the moral content of those acts or the way in which those acts might be deemed to reflect on petitioner's character. Rule 404(b) therefore imposed no prohibition on the use of that evidence.[14]

To be sure, Cory K.'s and Kyle Hartman's testimony suggested that petitioner had moral shortcomings. But the mere fact that the evidence may have reflected badly on petitioner's character did not mean that the evidence could not be admitted for a different, proper purpose. As this Court has explained, "there is no rule of evidence which provides that testi-

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beries could be said to be a "character trait," as could the practice of whistling a particular tune during a robbery or shooting a teller before leaving the scene of a bank robbery. But courts have generally confined the notion of "character," for purposes of the admissibility of "similar act" evidence, to general moral qualities, which have limited relevance to the commission of particular illegal acts. See Kuhns, *The Propensity to Misunderstand the Character of Specific Act Evidence*, 66 Iowa L. Rev. 777 (1981).

[14] Petitioner labels Cory K.'s and Kyle Hartman's testimony as "propensity" evidence and suggests that it is therefore inadmissible. See, *e.g.*, Pet. Br. 17, 39 n.13, 41 n.14. Rule 404(b), however, limits the use of extrinsic act evidence to prove "character"—not "propensity." The prosecutor did not use the testimony to draw character-based inferences, and petitioner's arguments based on "propensity" depart from the specific language of the Rule.

mony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." *Abel*, 469 U.S. at 56. It is possible, of course, that a jury could misuse the evidence by drawing character inferences based on a pattern of immoral conduct. But Rule 404(b) does not address that problem. As we explain below, the Federal Rules of Evidence provide other mechanisms to deal with that concern. See *Huddleston*, 485 U.S. at 691. Fed. R. Evid. 404(b) advisory committee's note.

C. The Probative Value Of The Testimony Was Not Substantially Outweighed By The Danger Of Unfair Prejudice

Rule 403 states that relevant evidence, admitted for a proper purpose, may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403.[15] "'Undue prejudice' withir its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note. Petitioner's principal contention (Pet. Br. 20-41) is that the trial judge erred in applying Rule 403 and that the court should have excluded the testimony of Cory K. and Kyle Hartman under that Rule. The court of appeals, however, noted that the decision whether to exclude evidence under Rule 403 is subject to the district court's discretion, and it correctly

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[15] Rule 403 also provides that relevant evidence may be excluded if it "is substantially outweighed by the danger of * * * confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

held that the trial judge did not abuse his discretion in this case. J.A. 178-179.

1. The people of the United States have decided to place their confidence in a jury of ordinary citizens to determine whether an accused has committed a crime. See U.S. Const. Art. III, § 2, Cl. 3; Amend. VI. That decision expresses a belief that jurors properly apprised of relevant evidence can determine facts accurately through the application of logic and their own experience. In accordance with that belief, it is vitally important that the jury have broad access to probative evidence. If the jury is denied access to such evidence without good cause, its truth-finding function—and public confidence in the criminal justice system—will suffer. See *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."); *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) (noting the "public interest in having juries receive all probative evidence of a crime"); *Taylor* v. *Illinois*, 484 U.S. 400, 411-412 (1988) (noting the "broader public interest in a full and truthful disclosure of critical facts" to the jury).

There is little room to dispute that the testimony of Cory K. and Kyle Hartman was relevant to the question whether petitioner engaged in the charged acts with the requisite mental state. As we have explained, the government's theory at trial was that petitioner used his position as a teacher to foster the trust of young boys and then sexually abuse them. The testimony of Cory K. and Kyle Hartman demonstrated that petitioner had previously engaged in the same distinctive and unusual behavior. As both the trial judge and the court of appeals recognized, that

testimony had substantial probative value because the specific incidents the witnesses related were very similar to the charges at trial. See J.A. 35, 70, 176-178.

At the time of the incidents they described, Cory K. and Kyle Hartman,—like Amadee R., Jonathan T., and Fernando Y.—were pre-teenage boys who attended school in the Kayenta area. In Kyle Hartman's case, petitioner established a relationship with the boy through his position as a teacher's aide. In the case of both Cory K. and Kyle Hartman, petitioner took the boys to his trailer home, where he performed the same sexual acts—genital touching and anal sodomy—that were charged in the indictment. Petitioner's preparatory actions in the case of Cory K., such as putting on a videotaped movie and applying Aloe lotion, were virtually identical to actions that Amadee R. described.[16]

As the Rules Advisory Committee explained, the "availability of other means of proof" is an important factor in weighing the probative value of evidence. See Fed. R. Evid. 403 advisory committee's note:

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[16] Petitioner contends (Br. 39-40 & n.13) that the events Hartman described were too remote to be probative. In light of the reasons for admitting Hartman's testimony, however, the passage of time did not substantially undermine the probative value of the evidence. See 2 D. Louisell & C. Mueller, *Federal Evidence* § 140, at 195-198 (1985). The Hartman evidence simply indicated that the state of mind that accompanied petitioner's contacts with pre-adolescent boys and his motivation for associating with them remained the same over a period of years. Moreover, the passage of time actually strengthened the probative value of the evidence in one respect, since it refuted petitioner's suggestion that the government had fabricated the charges against petitioner by persuading impressionable young boys in the community to testify against petitioner.

see also Fed. R. Evid. 404(b) advisory committee's note. The testimony of Cory K. and Kyle Hartman was especially probative in light of the proof problems the government faced in this case. The charged offenses were committed outside the presence of other witnesses, against inarticulate young Indian children. As their halting and monosyllabic responses indicated, the child witnesses had difficulty in understanding and reluctance in answering the questions posed. See Tr. 385-427 (Fernando Y.), 428-492 (Jonathan T.), 537-606 (Amadee R.); see also 712-743 (Dr. Rosenzwieg). See generally *Maryland* v. *Craig*, 110 S. Ct. 3157, 3167-3170 (1990).[17]

Far from being "unnecessary" (Pet. Br. 29), the testimony of 19-year-old Cory K. and 27-year-old

[17] The trial judge made precisely that point, J.A. 70:

> I have to consider the nature of a trial such as this * * * and the methods of proof that are available to the Government in these kind of instances is severely lacking. And it is more severely lacking when you go to an Indian Reservation and have young people, who are unsophisticated * * * with respect to the acts that are being visited upon them, arguably, but also unsophisticated with respect to the people who investigate these activities, and the questions that are asked and the phrasing of the questions and all those matters, which inevitably lead to impeachment, credibility issues.
>
> And that has really been evident in this case as it was evident in the prior case that I tried recently * * *.
>
> There is a reluctance on the part of younger people to testify, a general unwillingness to do it, an unwillingness to come forward and be identified in these kind of activities. And as I say, the opportunities to confuse witnesses, to confuse issues, is simply overwhelming.

The problem with eliciting evidence from the child witnesses was exacerbated in the case of Amadee R., who admitted that he had some difficulty communicating in English, which was not his native language. Tr. 597.

Kyle Hartman was important to the jury's understanding of the facts. The trial judge, who heard their testimony outside the presence of the jury before ruling on its admissibility, properly concluded that the testimony should be allowed. Unlike the victims in this case, Cory K. and Kyle Hartman were old enough to understand the sexual aspects of petitioner's behavior and to describe it articulately. For the same reason, their testimony was highly probative in refuting petitioner's defense that the FBI had created witnesses by manipulating the children who testified to the charged acts of sexual abuse.[18]

2. Petitioner contends that the "other acts" evidence was not probative because he did not contest the intent elements of the charged crimes at trial, and "[a] bare plea of not guilty is insufficient to allow the admission of uncharged misconduct evidence on an uncontested issue." Pet. Br. 29. This Court squarely rejected that argument in *Estelle* v. *McGuire*, where the Court stated that

> the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts, "[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged." * * * The evidence * * * was relevant to show intent, and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to

[18] Petitioner's argument (Pet. Br. 34) that the trial judge erred by prematurely admitting Cory K.'s testimony is without merit. From petitioner's opening statement and his cross-examination of the victim witnesses, the nature of his defense in this case was clear. Moreover, a trial judge exercises "the broadest sort of discretion in controlling the order of proof at trial." *Huddleston*, 485 U.S. at 690.

> refrain from introducing relevant evidence simply because the defense chooses not to contest the point.

112 S. Ct. at 481. See J.A. 178.

Petitioner alternatively contends that his offer "to concede or stipulate to the issue of intent should be a relevant factor to consider under Rule 403." Pet. Br. 42. No one disputes that general proposition.[19] As petitioner concedes (Pet. Br. 45-46), however, a defendant has no right to control the government's case by tactical stipulations that undermine the government's evidentiary presentation. The Seventh Circuit has made precisely that point, explaining that Rule 403 does not require the automatic acceptance of such stipulations in lieu of evidence:

> A fact may be proved as long as the probative value of the proof still exceeds the prejudicial effect, taking into account the offer to stipulate * * *. Indeed, [a] cold stipulation can deprive a party of the legitimate moral force of his evidence * * * and, can never fully substitute for tangible, physical evidence or the testimony of witnesses.

United States v. *Allen*, 798 F.2d 985, 1001 (1986) (citations, internal quotation marks, and emphasis omitted); accord *United States* v. *Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980). See also, *e.g.*, *United States* v. *Pedroza*, 750 F.2d 187, 201 (2d Cir. 1984), cert. denied, 479 U.S. 842 (1986). See J.A. 178.[20]

[19] The Rules Advisory Committee recognized that "situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent," noting that "the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403)." Fed. R. Evid. 401 advisory committee's note.

As the district court concluded, petitioner's offer to stipulate was an inadequate substitute for the witnesses' testimony. Petitioner was willing to stipulate only that if petitioner anally sodomized Amadee R. or fondled the genitals of Amadee R., Jonathan T., or Fernando Y. he did not do so because of "mistake or accident or other innocent reason." J.A. 169-170. See also J.A. 29-30, 33. His proposed stipulation—which simply amounted to a tautologous concession that if petitioner engaged in sexual acts, he did so for sexual pleasure—conceded nothing. A court may properly reject such a stipulation. See *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1581 (11th Cir. 1988).[21]

In addition, petitioner's proposed stipulation would have deprived the jury of evidence that was highly relevant in determining whether petitioner committed the charged offenses. Significantly, the charges included attempt offenses in which petitioner's intent

[20] Contrary to petitioner's assertions, Pet. Br. 44-45, the court of appeals in this case did not adopt a "rigid rule" concerning stipulations. Indeed, it did not address the issue at all. That is not surprising inasmuch as petitioner devoted only a few sentences in his lengthy court of appeals briefs to arguing the effect of the proposed stipulation. Pet. C.A. Br. 37-38; Pet. C.A. Reply Br. 13.

[21] Petitioner acknowledged at trial that "[w]e are never going to argue that sure [petitioner] inserted his penis in somebody's anus, but he did it innocently." J.A. 15. In this Court, he likewise acknowledges that "[i]t is simply impossible to argue with a straight face that [petitioner] could attempt to insert his penis into the anal opening of a young boy for some purpose other than sexual gratification." Pet. Br. 27.

was of paramount importance, because the sexual nature of the act depended on petitioner's state of mind. See 18 U.S.C. 2241. With respect to such potentially ambiguous conduct, a stipulation that if he engaged in a sexual act he did it for sexual gratification would provide the jury with no assistance at all in determining whether petitioner was attempting to perform a sexual act. As the judge noted, if "the offer to admit was that in other instances [petitioner] engaged in this conduct [sexual acts wth children], then that would be a different story." Tr. 878. But "to simply have a sterile stipulation that if [petitioner] did these things, that was his intention, certainly takes from the jury the opportunity to judge [his] intention and act upon it." *Ibid.*

The district judge's analysis of the stipulation was correct. Petitioner was not willing to stipulate to the substance of the witnesses' testimony—that petitioner had previously engaged in similar sexual acts with children of similar age in similar circumstances. As the district judge recognized, to accept the far more limited stipulation that petitioner offered in lieu of direct testimony from Cory K. and Kyle Hartman would have deprived the government of its right to present its case fully and effectively. See J.A. 35.

3. Petitioner argues that the probative value of the extrinsic act testimony was substantially outweighed by the danger that the evidence would result in unfair prejudice. Pet. Br. 35-39. See J.A. 16-18, 20-21. The government's use of extrinsic act evidence, however, does not result in "unfair prejudice" simply because it increases the likelihood of conviction. The fundamental purpose of a criminal trial is to determine facts reliably—not to give the defendant a "chance of winning." J.A. 20. A defendant may

find that extrinsic act evidence is "devastating," J.A. 18, 20, precisely because it is highly probative in determining the facts. To exclude evidence as unfairly prejudicial under Rule 403, the defense must show that the admission of the evidence may "suggest a decision on an improper basis." Fed. R. Evid. 403 advisory committee's note. Even then, the evidence is admissible unless that danger "substantially" outweighs the probative value of the evidence. Fed. R. Evid. 403.

The testimony of Cory K. and Kyle Hartman raised the possibility of unfair prejudice in the sense that the jury might have used the testimony to conclude that petitioner had a "bad" character and might have convicted him on that basis. That possibility is always present when extrinsic acts have moral connotations, but there is no reason to presume that a jury will typically misuse evidence in that manner. Rule 404 (b) prohibits the prosecutor from using extrinsic act evidence to imply bad character, and a rational jury can be expected to reject that implication on its own, reasoning that character-based inferences are not reliable. See Fed. R. Evid. 404 advisory committee's notes. Although particular juries might depart from the ideal of the rational jury, there is no reason to assume that a jury will naturally draw character inferences if the prosecutor has not suggested such inferences in presenting his case.[22]

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[22] Petitioner suggests that the prosecutor acted improperly in using Kyle Hartman's testimony in closing argument to refute petitioner's statement that he did not have intercourse with children. Pet. Br. 17, 41 n.14. See Tr. 1729. As we have explained, however, Hartman's testimony was properly admitted for that purpose. See pp. 22-24, *supra*. Petitioner also suggests that the prosecutor improperly "hinted" in his rebut-

The danger of unfair prejudice is most likely to arise if the evidence appeals to the jury's emotions. See Fed. R. Evid. 403 advisory committee's note. Although extrinsic act evidence that a person sexually abused children obviously can have an emotional impact on the jury, the marginal impact of that evidence was limited in this case, because petitioner was already being tried on charges that he sexually abused children. The jury heard the opening statements of counsel, the testimony of the three child victims, and the testimony of other witnesses—all relating to sexual abuse of children—before any extrinsic act evidence was admitted. Thus, the testimony of Cory K. and Kyle Hartman did not introduce an inflammatory subject for the first time in the trial.[23]

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tal argument that the testimony of Cory K. and Kyle Hartman "could be used to show [petitioner's] propensity." Pet. Br. 17, 39 n.13, 41 n.14. The prosecutor stated as follows:

> [Petitioner's counsel] did say to look to corroboration, and I think I concur with him on that, but look to the corroboration on both sides. Look to the corroboration in this particular instance of this unusual attraction to boys, of this grabbing of the private parts, or engaging in anal intercourse, allowing a minor to drive a car, the seduction that takes place at his trailer.

Tr. 1798. The prosecutor's use of extrinsic act evidence to corroborate the distinctive aspects of petitioner's behavior, his specific motivations, and his reasons for associating with children—what petitioner describes as "propensity"—was entirely proper. See pp. 22-24, 28-29, *supra*. The trial court correctly rejected petitioner's objection to those statements. Tr. 1803-1804.

[23] Although petitioner complains about "the introduction of massive amounts of extremely prejudicial prior bad acts" (Pet. Br. 18), the testimony of Cory K. and Kyle Hartman occupied a relatively small portion of the trial proceedings. Cory K.'s entire testimony before the jury is contained in 63

The danger of unfair prejudice in this case was further reduced by the trial court's use of traditional mechanisms for preventing prejudice, including directions to counsel restricting the scope of the evidence admitted and instructions to the jury specifying how the evidence could be used. See *Huddleston*, 485 U.S. at 691; *Spencer* v. *Texas*, 385 U.S. 554, 561-562 (1967). The trial judge took special precautions "to screen or sanitize" the testimony "as much as possible" so that "the gross nature of the other acts simply wouldn't be so prejudicial as to inflame the jury." J.A. 28; see also J.A. 30, 83-84. As a result, the testimony was not unduly graphic. See J.A. 78-81, 127-135. In addition, the trial court gave the jury limiting instructions on the use of extrinsic evidence at the time Cory K. and Kyle Hartman testified, J.A. 75, 127, and at the close of trial, Tr. 1715-1716.

Petitioner contends that the court's limiting instructions "did not eliminate the prejudice." Pet. Br. 40-41. As this Court has repeatedly held, however, a jury is presumed to follow such instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-208 (1987) (collecting cases). There is no reason to doubt that the jury did so here. The danger of prejudice was

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of the 1823 pages of trial transcript. See Tr. 893-956. He described sexual acts, on direct and redirect examination, in less than seven of those pages. Tr. 897, 902-903, 909-910, 951-952 (J.A. 75, 79-80, 84-85). Kyle Hartman's entire testimony before the jury is contained in ten pages. Tr. 1663-1672 (J.A. 125-132). The prosecutor made only brief mention of Cory K.'s and Kyle Hartman's testimony in closing argument. See Tr. 1725, 1728-1729, 1798-1799. Notably, petitioner would have been tried in the same proceeding on charges that he sexually abused Cory K., except that the relevant counts of the indictment had been severed to allow petitioner to present a "consent" defense to the charges pertaining to Cory K. See pp. 2-3, 5-6, *supra*.

further minimized in this case because the pattern limiting instruction given by the judge, see Tr. 886-888, was, if anything, overly restrictive in setting out the use the jury could make of the challenged evidence. The judge first instructed the jury that it could consider the evidence "only to the extent that they show motive, intent, preparation or planning." J.A. 75, 127; Tr. 1715. The judge then stated that

> evidence that [petitioner] may have committed a similar act at an earlier time may not be considered by the jury in determining if [petitioner] is guilty of any of the offenses involved in this case.

J.A. 75, 127; Tr. 1715. The judge additionally stated that the evidence could not be used

> to establish motive, intent, preparation or planning, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that [petitioner] did the particular acts charged in the indictment before you.

J.A. 75, 127; Tr. 1715-1716. As we have explained, it would have been proper for the court to permit the jury to use the testimony of Cory K. and Kyle Hartman to determine whether petitioner committed the charged acts in the first place; it was not necessary for the court to prohibit the jury from making use of the extrinsic act evidence unless it found from the other evidence in the case that petitioner had committed the charged acts. Petitioner therefore was the beneficiary of an overly favorable limiting instruction.[24]

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[24] Petitioner recites other "additional factors" that he contends added to the prejudicial effect of the evidence. Pet. Br. 39 n.13. As we have explained, Hartman's testimony was not too remote (see p. 31 n.16, *supra*), the government did not use the extrinsic act evidence improperly in closing argument (see p. 37 n.22, *supra*), and petitioner was not "improperly baited" on cross-examination (see p. 23 n.10, *supra*). The district judge also did not err in refusing to grant petitioner a one-month continuance to investigate Hartman's allegations. J.A. 68. The government announced on a Thursday that it had located Hartman and intended to call him as a witness. J.A. 48. Hartman did not testify until the following Tuesday. The judge inquired into the matter and determined that petitioner had an adequate amount of time under the circumstances to interview Hartman and to investigate his allegations. See J.A. 67-68; Tr. 1674-1676. The judge's refusal to grant a continuance was not an abuse of discretion. See *Morris* v. *Slappy*, 461 U.S. 1 (1983).

In sum, the trial judge did not abuse his discretion under Rule 403 in refusing to exclude the extrinsic act testimony in this case. The testimony was highly probative, and even taking into account petitioner's offer to stipulate, the risk of unfair prejudice was slight.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1992

APPENDIX

STATUTES AND RULES INVOLVED

The Sexual Abuse Act of 1986, 18 U.S.C. 2241 *et seq.*, provides in pertinent part:

§ 2241. Aggravated sexual abuse

(a) By force or threat.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

* * * * *

(c) With children.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

* * * * *

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear * * *;

* * * * *

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

* * * * *

§ 2244. **Abusive sexual contact**

(a) Sexual contact in circumstances where sexual acts are punished by this chapter.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if to do so would violate—

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years; or both;

* * * * *

§ 2245. **Definitions for chapter**

As used in this chapter—

* * * * *

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

* * * * *

The Federal Rules of Evidence provide in pertinent part:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considera-

tions of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule. 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

* * * * *

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

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